

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIM WOOD,

Claimant,

v.

JOE BARKOW, dba B & G ALL PHASE
CONSTRUCTION, Employer, and
STATE INSURANCE FUND, Surety,

and

LARRY WARD, dba CRETE DOG
CONSTRUCTION, Employer,

Defendants.

IC 2006-519690

IC 2006-005007

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

April 16, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Idaho Falls on December 11, 2007. Stephen A. Meikle of Idaho Falls represented Claimant. M. Jay Meyers of Pocatello represented Defendants B & G All Phase Construction (All Phase) and State Insurance Fund. Shan B. Perry of Idaho Falls represented Defendant Crete Dog Construction (Crete Dog). The parties submitted oral and documentary evidence as well as post-hearing briefs. The matter came under advisement on March 31, 2008 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant was an employee of Crete Dog at the time and place of the alleged accident and injury;

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2. Whether Claimant sustained an injury caused by an accident arising out of and in the course of employment; and

3. Whether Crete Dog and/or All Phase are liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability¹.

CONTENTIONS OF THE PARTIES

The threshold issue in this case is whether Claimant was an employee of Crete Dog on the date of the claimed injury. It is undisputed that Crete Dog was a sub-contractor on a residential housing project who was hired by All Phase, the general contractor, to pour concrete slabs. It is further undisputed that Crete Dog was uninsured for purposes of workers' compensation at the time of the claimed injury and that, if Claimant sustained an injury arising from an accident on May 1, 2006 while an employee of Crete Dog, All Phase is the statutory employer pursuant to Idaho Code § 72-216.

Claimant contends that he sustained an injury to his right shoulder on May 1, 2006 on his first and only day of employment with Crete Dog. Claimant maintains that he was hired at the end of a telephonic interview with Larry Ward, the owner of Crete Dog, on April 27, 2006. He further asserts that he met with and was put to work by Larry Ward on the morning of May 1, 2006, at which time he worked along side Mr. Ward for a couple of hours, spreading concrete on a basement floor of a partially constructed house. Claimant attempted to climb out of the basement when the concrete pour was complete, but lost his footing while pulling himself to ground level and felt a pop in his right shoulder. Claimant admits to previous right shoulder

¹ In his post-hearing brief, Claimant also asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 because All Phase's denial of the claim was unreasonable. This issue was not identified in the Notice of Hearing dated January 30, 2007 or identified as an issue at hearing. Recovery of attorney fees pursuant to Idaho Code § 72-804 was not timely raised and will not be addressed in this decision.

problems, but asserts that the injury aggravated his right shoulder condition and resulted in a new injury.

Larry Ward asserts that Claimant was merely a prospective employee and was never hired by Crete Dog. Crete Dog contends that work performed by Claimant on May 1, 2006, if any, was on a volunteer basis and was essentially a “try-out” for the job of concrete finisher. Crete Dog asserts that Claimant lacks credibility and points out multiple reasons why the existence of an employer/employee relationship with Claimant was unlikely. Crete Dog acknowledges a lapse in its workers’ compensation coverage from February of 2006 through May 9, 2006.

All Phase was the general contractor of the construction project in question and hired Crete Dog for concrete work. All Phase maintained a policy of workers’ compensation coverage through State Insurance Fund at the time of the claimed injury. All Phase joins in the position of Crete Dog regarding the employment status of Claimant and does not concede that Claimant sustained an injury arising out of an accident. All Phase asserts that Claimant lacks credibility and was, at best, a volunteer seeking to make a good impression in hopes of getting hired by Crete Dog. All Phase points out the existence of Claimant’s pre-existing right shoulder problems.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Timothy (Tim) S. Wood, David Frederickson, Robert Hatch, Larry Ward and Douglas (Doug) Warren Beaty;
2. Claimant’s Exhibits 1 through 6;
3. Crete Dog’s Exhibits LW-1 through LW-4;

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4. All Phase's Exhibits A through F; and
5. The Industrial Commission's legal file.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

How Claimant Ended up at the Job Site - Claimant's Version

1. Claimant was born on October 21, 1949. He began work in the construction and concrete industry in 1972 and maintains his own set of concrete tools². Claimant completed a job in the spring of 2006 that included a concrete pour, after which he was looking for new employment.

2. In April of 2006, Claimant reviewed job listings posted at Job Services and learned that Larry Ward had an opening for "flat work and setting panels" in the Idaho Falls area with a pay rate of \$14 per hour. Claimant identified another job opening in Victor, Idaho, offering \$16 per hour, but preferred to work locally and avoid a commute.

3. Claimant contacted Larry Ward by phone on April 27, 2006 to discuss employment. Claimant represented that he had 33 years of experience in the trade and had his own set of concrete tools. Larry Ward requested that Claimant meet him on Monday morning, May 1, 2006, at a church parking lot at 7:00 a. m. so that they could drive together to the work site. Mr. Ward told Claimant to bring his tools and be ready to go to work.

4. Claimant and Mr. Ward met in the church parking lot as arranged and Claimant followed Mr. Ward to the job site, a housing addition. Cement trucks arrived and Claimant went

² Claimant's ownership of concrete tools is relevant to the extent that it demonstrates his previous experience with concrete work. There is no contention that Claimant was an independent contractor at the time of the claimed injury.

into the basement with Mr. Ward, at Mr. Ward's request. Claimant spread concrete with Mr. Ward for approximately an hour and half as it came out of the trucks. Two additional employees, including Robert Hatch, were in the basement spreading concrete. Larry Ward left the job site after receiving a phone call and Claimant continued to spread concrete for an additional 30 minutes.

5. Claimant and Mr. Ward did not discuss Claimant's employment status. Mr. Ward did not indicate that Claimant's work was to be on a volunteer basis or that an employment decision was otherwise being deferred. Claimant believes that he was hired during the phone conversation of April 27, 2006, at which time Mr. Ward told him to bring his tools and be ready to work on the morning of May 1, 2006.

How Claimant Ended up at the Job Site - Larry Ward's Version

6. Larry Ward agrees that he placed a listing with Job Services and testified that he also placed an ad in the newspaper seeking an employee to perform concrete work. Mr. Ward further agrees that he spoke with Claimant over the phone on April 27, 2006, met him at the church parking lot on the morning of May 1, 2006 and led him to the job site.

7. Mr. Ward does not recall discussing Claimant's job history over the phone, but remembers asking Claimant about whether he had performed concrete work, once they were at the job site. Claimant indicated that his recent work involved finish framing and that he had not worked with concrete recently. Claimant volunteered that he had a previous injury to his shoulder.

8. Mr. Ward received a phone call which prompted him to leave the job site. He advised Claimant that he'd "get back with him." The concrete pour was just starting when Mr. Ward left the job site and Mr. Ward denies going into the basement that morning. He further

denies working along side Claimant for any period of time and “had no personal knowledge” of Claimant performing work at the site.

9. Mr. Ward agrees that employment status was not discussed with Claimant at the job site on the morning of May 1, 2006 and that he never expressly represented to Claimant that he had been hired, would not be hired and/or that he was expecting Claimant to work on a volunteer basis for a trial period.

10. As Mr. Ward was driving away from the job site, he was leaning towards not hiring Claimant, but had not made up his mind completely. He testified that he decided not to hire Claimant, prior to learning of the claimed injury, because of Claimant’s lack of recent experience and lack of knowledge of how work was done by Crete Dog, as well as concerns about whether Claimant was medically released to work. Further, Mr. Ward was left with a general bad impression of Claimant after the two were “verbalizing” at the job site.

11. Mr. Ward asserts that his version of events is more credible than Claimant’s version because: he has never hired someone over the phone and didn’t hire Claimant over the phone; he always gets a W-4 form completed before an employee is allowed to work on a job which was not done with Claimant; and, although he is in charge of hiring and firing for Crete Dog, he always talks with his foreman, Doug Beaty, before hiring a concrete worker and he did not introduce Claimant to Mr. Beaty or discuss Claimant as a potential hire with Mr. Beaty.

Claimant’s Pre-Existing Right Shoulder Condition

12. Claimant sustained multiple injuries in November of 1987 when he jumped into his previously unattended vehicle that started to roll away, in reverse. The primary injury involved a right finger tendon which required surgical repair. Discomfort to the right shoulder was noted by orthopedic surgeon, Phillip McCowin, M.D., on November 26, 1997, and Claimant

was diagnosed with isolated rotator cuff tendonitis. Dr. McCowin's records reflect a full recovery from all aspects of the November 1997 injury by early 1998.

13. In August of 2005, Claimant was involved in a motorcycle accident which resulted in a broken nose and the need for scalp stitches. Immediately after the wreck, Claimant picked his bike up from the pavement and felt a pop in his right shoulder. Claimant reports being told by a medical service provider that he might have a slight tear of his rotator cuff. The evidence does not include diagnostic studies of the right shoulder prior to May of 2006 and there is no indication that such studies were performed between the motorcycle wreck and the claimed industrial injury.

14. James W. Brook, D.O., provided intermittent primary care to Claimant. On December 27, 2005, Dr. Brook noted the motorcycle accident, provided an injection to the subacromial space of Claimant's right shoulder, and diagnosed right shoulder impingement syndrome. A second injection was performed by Dr. Brook on March 9, 2006, at which time the impingement diagnosis was reiterated, and it was documented that Claimant's shoulder condition was exacerbated by throwing darts a few days earlier. Claimant's recollection is that his right shoulder condition was 95% improved following the March 2006 injection.

The Injury of May 1, 2006

15. Claimant entered the basement where the concrete was poured by climbing into a hole and did not experience difficulty doing so. The only way to exit the basement was through an unfinished window. A ladder was not available at the job site, and Claimant commented to Mr. Ward about the absence of a ladder when entering the basement, which is what prompted Claimant to mention his prior shoulder injury. Claimant attempted to exit the basement by pulling himself up and out of the window. The window was near the top of the wall and not

designed for egress from the basement. Claimant lost his footing and hung momentarily from his fingertips before dropping into the bottom of a hole, outside of the basement wall, in a trench-type area that had not yet been backfilled.

16. Claimant felt pain and a pull through his arms and fingers during the few seconds while he dangled from his finger tips and believes that is when his injury occurred. Claimant testified that he utilized a makeshift ladder given to him by Robert Hatch to get out of the trench area.

What Crete Dog's Other Workers Say

David Fredrickson

17. David Fredrickson was hired as a foreman by Crete Dog in May or June of 2006, after the date of the claimed injury, and does not have personal knowledge about Claimant's employment status with Crete Dog or the claimed injury of May 1, 2006. Mr. Fredrickson had a falling out with Larry Ward and is involved in litigation against him, unrelated to this workers' compensation claim.

18. Mr. Frederickson's testimony regarding his own hiring by Crete Dog was credible and supported by the documentary evidence. His hiring process was initiated by a call to Larry Ward during which he expressed an interest in employment, outlined his prior work experience (approximately 28 years with concrete), and made plans to meet with Larry Ward. Mr. Frederickson was put to work for Crete Dog on the morning he met Mr. Ward in either late May or early June of 2006, but he did not complete a W-4 form until July 24, 2006.

Robert Hatch

19. Robert Hatch was hired as a laborer and concrete worker by Crete Dog in early January of 2006. Employment was initiated by a phone call to Mr. Ward, but Mr. Hatch was not

hired over the phone. Mr. Hatch had eight or nine months of concrete experience prior to going to work for Crete Dog. Mr. Hatch's testimony was conflicting with regard to the existence of a pre-hire period of volunteer work. Mr. Hatch initially testified that he was paid for the first day he went to work for Crete Dog but subsequently testified that he went to work for Crete Dog for free in order to demonstrate his abilities and that such a procedure was commonplace³.

20. On his first day of employment with Crete Dog, Mr. Hatch learned about Doug Beaty while working throughout the day, but did not have a formal introduction to Mr. Beaty or the rest of the crew.

21. Mr. Hatch observed Claimant raking concrete in the basement at the time of the floor pour on May 1, 2006 and assisted him in doing so. Mr. Hatch was aware that Claimant was having difficulty getting out of the basement after the pour. He fashioned a ladder out of scrap wood to assist Claimant out of the basement. It is Mr. Hatch's recollection that Claimant was already extricated by the time the ladder was ready.

22. Mr. Hatch had a conversation with Claimant while cleaning tools after Claimant got out of the basement. He saw Claimant "kind of cupping" his right shoulder and holding it still. Claimant mentioned to him that he felt like he might have hurt something and heard something pop.

Doug Beaty

23. Doug Beaty has approximately 17 years of experience in concrete work and was employed by Crete Dog for three to four years beginning in 2003. He was working as a foreman

³ Claimant sought a copy of Mr. Hatch's W-4 form through discovery and a Motion to Compel. Larry Ward asserted that the document was lost or misplaced and could not be produced. Similarly, W-4 forms for Doug Beaty, Omar Rodriguez and William Wall were requested by Claimant but not produced because they could not be located.

on May 1, 2006 and recalls Claimant being at the job site, but did not personally observe Claimant working.

24. Mr. Beaty was paid wages for the first day he worked for Crete Dog and has never worked for free or on a volunteer basis. He is unaware of employees having a try-out period prior to being hired by Crete Dog.

25. He knows most of the concrete workers in the Idaho Falls area and Mr. Ward would usually ask him about prospective hires. Mr. Ward neither asked him about Claimant nor introduced Claimant as part of the crew.

26. He remembers Mr. Ward leaving the job site on the morning of May 1, 2006 but doesn't recall whether Mr. Ward helped with the pour before leaving.

27. He was made aware that Claimant was having difficulty getting out of the basement and instructed Mr. Hatch to make a ladder.

After the Injury

28. Prior to leaving the job site, Claimant discussed his injury with Mr. Hatch and provided his contact information for Mr. Hatch to pass along to Mr. Ward. Claimant left cell phone messages for Mr. Ward at approximately 10:20 a. m. and 11:20 a. m., on the morning of the injury. He spoke with Mr. Ward by cell phone at approximately 11:30 a. m., at which time he reported the injury and inquired about medical treatment. The phone calls placed by Claimant to Mr. Ward are substantiated by the usage summary on Claimant's cell phone bill.

29. According to Claimant, Mr. Ward hung up on him during the 11:30 a. m. phone conversation after telling Claimant: "You are not on my paperwork. You are not employed by me."

30. Mr. Ward denies speaking to Claimant by phone on May 1, 2006. He testified at hearing that he was unaware of the claimed injury until the following day. During deposition testimony taken in October 2006, he denied speaking to Claimant about the injury on May 1, 2006, and indicated that his first knowledge of the claimed injury was from a phone call he received about Claimant's claim for unemployment benefits. Documentary evidence establishes that a representative from the Idaho Department of Commerce and Labor contacted Mr. Ward on May 9, 2006.

31. Claimant sought treatment with Dr. Brook on May 1, 2006. The history of injury recorded by Dr. Brook is consistent with how Claimant described his injury at hearing. Dr. Brook diagnosed a torn biceps tendon and referred Claimant to Dr. McCowin.

32. Mr. Ward contacted Dr. Brook's office by phone during the afternoon of May 1, 2006, inquiring about Claimant's condition. Dr. Brook declined to speak with Mr. Ward until his office could confirm that Claimant consented to such discussion and disclosure of medical information. Claimant gave his consent and Dr. Brook spoke with Mr. Ward by phone later that day. Dr. Brook documented the conversation in a letter of May 5, 2006. It is unclear from Dr. Brook's letter if the discussion pertained to Claimant's treatment prior to May 1, 2006, the injury of May 1, 2006, or both. Dr. Brook indicated that Mr. Ward referred to Claimant as a "potential hire".

33. Claimant pursued unemployment benefits on May 2, 2006, after learning from the Industrial Commission that Crete Dog did not have workers' compensation insurance. The fact finder who evaluated the unemployment benefit claim interviewed both Claimant and Mr. Ward. The evaluator concluded that neither party provided conclusive evidence that Claimant was or was not an employee, and ultimately concluded that benefits would be paid.

34. Dr. McCowin evaluated Claimant on May 10, 2006 and ordered a right shoulder MRI. Prior to review of MRI findings, Dr. McCowin opined that Claimant's condition could be either an exacerbation of a previous injury or a distinct new injury. After review of the MRI performed on May 25, 2006, Dr. McCowin concluded that there was "absolute evidence of a new and acute dislocation anteriorly as well as [a] massive rotator cuff tear." Dr. McCowin recommended surgical intervention.

DISCUSSION AND FURTHER FINDINGS

Credibility and Employment Relationship

35. An employer/employee relationship is a prerequisite to a finding of liability under the Idaho workers' compensation statutes. *Kennedy v. Forest*, 129 Idaho 584, 930 P.2d 1026 (1997). An "employee" is any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. Idaho Code § 72-102(11). An "employer" is any person who has expressly or impliedly hired or contracted for the services of another. Idaho Code § 72-102(12)(a).

36. There are two distinct types of implied contract, those implied-in-law and those implied-in-fact. *Kennedy* at 587. Implied-in-law contracts are quasi-contracts based on equitable theories and are insufficient to establish an employment relationship for purposes of workers' compensation liability. *Id* at 588. An implied-in-fact contract is a true contract whose existence and terms are inferred from the conduct of the parties and is sufficient to trigger workers' compensation liability. *Id*.

37. Generally, activities that are purely voluntary and gratuitous do not create an employer/employee relationship and are not covered by workers' compensation. *Parker v. Engle*, 115 Idaho 860, 771 P.2d 524 (1989); *Seward v. State Brand Division*, 75 Idaho 467, 274

P.2d 993 (1954). However, Idaho law recognizes that when a person is requested to assist in the furtherance of the business of an employer and the assistance is provided with the knowledge and acquiescence of the employer, the person providing assistance becomes, in effect, an employee. *Wise v. Transfer & Storage*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985) (citing *Larson v. Independent School Dist. No. 11J*, 53 Idaho 49, 56, 22 P.2d 299, 301 (1933)).

38. A determination as to whether an employment relationship existed between Claimant and Crete Dog on the morning of May 1, 2006 comes down to whether Claimant was working as a volunteer or was working pursuant to an implied-in-fact contract. Such a determination hinges on an evaluation of the credibility of the evidence, particularly as between the actions and testimony of Claimant and Larry Ward.

39. A claimed injury to a previously injured body part within an employee's first few hours of his or her first day of employment is understandably subject to scrutiny. However, the representations of Claimant regarding both his employment relationship with Crete Dog and the claimed injury are more credible, consistent, and persuasive than the representations of Larry Ward on the same issues. Claimant has met his burden of proof to establish that he was an employee of Crete Dog at the time of his injury, based on an implied-in-fact contract with Larry Ward. The phone conversation between Claimant and Mr. Ward on April 27, 2006, combined with the actions of Mr. Ward on the morning of May 1, 2006, is sufficient to infer that an employment relationship was established prior to the injury.

40. Claimant had significant previous experience with concrete work, including a recent job within one month prior to May 1, 2006. Claimant's testimony that he discussed his work experience with Mr. Ward by phone is credible and would be consistent with initial contact conversations between Mr. Ward and the other employees who testified at hearing. It makes

little sense that Mr. Ward would wait until Claimant showed up at the job site to inquire about his skills. Similarly, the testimony by Claimant that he initiated work in the presence of Mr. Ward is credible. The sequence of events reflects that Crete Dog advertised the need to hire a concrete finisher; Claimant responded to the listing and employment was discussed over the phone between Claimant and Mr. Ward; Mr. Ward directed Claimant to accompany him to the job site on the morning of May 1, 2006; and, Claimant initiated work in the presence of Mr. Ward. Mr. Ward's actions, as described by Claimant, reflect an implied-in-fact contract of hire.

41. Claimant was not working on a volunteer basis in hopes of getting hired. The only testimony regarding such a practice was from Mr. Hatch whose testimony was inconsistent. Both Mr. Frederickson and Mr. Beaty received wages for their first day of work for Crete Dog and Mr. Beaty, as foreman, was unaware of any alternate procedure. There is no evidence to establish that either Claimant or Mr. Ward contemplated a volunteer trial period of employment. Claimant pursued a job posting with an identified wage rate of \$14 per hour and had no reason to believe that he would need to volunteer his services in hopes of getting hired at a later date.

42. The documentary evidence, along with the testimony of Mr. Frederickson, establishes that none of Crete Dog's employees for whom documentation was produced completed a W-4 form prior to or on their first day of work. Rather, the seven employees for whom payroll and W-4 forms were produced completed the forms between four and twelve days after they began work. The testimony of Mr. Ward that he always had new hires complete a W-4 form prior to beginning work is not credible. Mr. Ward's explanation at hearing that the payroll records he produced do not necessarily correspond with dates the employees actually worked served to further undermine Mr. Ward's credibility rather than clarify why his testimony was inconsistent with the documentation.

43. Testimony and argument by Mr. Ward that he made the decision not to hire Claimant prior to learning of the claimed injury is not credible. The fact that Mr. Ward referred to Claimant as a “potential hire” when speaking to Dr. Brook does not necessarily support such a contention and it is more likely than not that Mr. Ward’s contact with Dr. Booth was initiated after and because Mr. Ward received notice of the claimed injury.

44. The credible evidence establishes that Claimant would have been paid for his work on May 1, 2006 and considered an employee of Crete Dog as of that date if he had not reported an injury and/or if Crete Dog had maintained a policy of workers’ compensation insurance through which benefits could be obtained.

Accident and Injury

45. Generally, work-related aggravations of pre-existing conditions are compensable if such aggravations arise from an accident. An employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate the opportunity for a workers’ compensation claim, provided the employment aggravated or accelerated the injury for which compensation is sought. *Spivey v. Novaris*, 137 Idaho 29, 43 P.3d 788 (2002).

46. An “accident” is defined by Idaho Code § 72-102 (18)(b) as an unexpected, undesigned, and unlooked for mishap , or untoward event connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Claimant losing his footing, dangling momentarily, and dropping to the basement floor when attempting to pull himself out of an unfinished basement at a construction site meets this definition. Claimant immediately experienced and reported a pop and pain in his right shoulder for which he sought medical treatment the same day.

47. A right rotator cuff injury was suspected following Claimant's 2005 motorcycle accident, but the extent of such an injury was neither confirmed nor ruled out by diagnostic study. Claimant demonstrated signs of right shoulder impingement in early March of 2006 and it does not appear that Claimant's previous right shoulder problems completely resolved by May 1, 2006. Nevertheless, the evidence is sufficient to establish that the industrial injury of May 1, 2006 aggravated Claimant's right shoulder condition. Right shoulder MRI findings of May 25, 2006 include evidence of recent dislocation with a Bankart lesion, a massive tear of the rotator cuff and tearing of the biceps tendon. These findings are distinct from degenerative joint disease and effusion which was also noted.

48. The opinion of Dr. McCowin that Claimant sustained a new and distinct injury is credible and uncontroverted. Dr. McCowin had the opportunity to evaluate Claimant's right shoulder condition both prior to and following the injury of May 1, 2006. His opinion is supported by objective findings noted in the MRI study of May 25, 2006.

Penalties Pursuant to Idaho Code § 72-210

49. Idaho Code § 72-210 states:

EMPLOYER'S FAILURE TO INSURE LIABILITY. If an employer fails to secure payment of compensation as required by this act, an injured employee, or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel.

50. Crete Dog failed to carry workers' compensation insurance at the time of injury and is liable for the statutory penalty as well as costs and reasonable attorney fees. The total amount of the penalty cannot be calculated at this time, because the amount of future medical care and income benefits, if any, cannot be calculated with specificity.

51. A statutory employer who carries workers' compensation insurance is not liable to an employee of an uninsured contractor for penalties set out Idaho Code § 72-210. *Vickers v. Pyramid Framing Contractors, Inc.*, 123 Idaho 732, 852 P.2d 484 (1993). All Phase maintained a policy of workers' compensation insurance at all times relevant to this case and is not liable for the 10% penalty, costs or attorney fees.

CONCLUSIONS OF LAW

1. Claimant was an employee of Crete Dog at the time of his injury on May 1, 2006.
2. Claimant sustained an injury caused by an accident arising out of and in the course of his employment with Crete Dog.
3. Crete Dog is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __10__ day of __April____ 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Susan Veltman, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TIM WOOD,)	
)	
Claimant,)	IC 2006-519690
)	IC 2006-005007
v.)	
)	
JOE BARKOW, dba B & G ALL PHASE)	
CONSTRUCTION, Employer, and)	ORDER
STATE INSURANCE FUND, Surety,)	
)	
and)	April 16, 2008
)	
LARRY WARD, dba CRETE DOG)	
CONSTRUCTION, Employer,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant was an employee of Crete Dog at the time of his injury on May 1, 2006.
2. Claimant sustained an injury caused by an accident arising out of and in the course of his employment with Crete Dog.

3. Crete Dog is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __16__ day of __April_____, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/participated but did not sign_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __16_ day of __April____, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

STEPHEN A MEIKLE
P O BOX 51137
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M JAY MEYERS
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POCATELLO ID 83205

SHAN PERRY
P O BOX 50130
IDAHO FALLS ID 83405-0130

jkc

_____/s/_____
